Othman Merican v Kumpulan Jurutera Maju Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2 (S6)–23–125 OF 1988
KAMALANATHAN RATNAM J
5 APRIL 2001

Civil Procedure *— Judgment — Consent judgment — Failure to comply with — Settlement in installments — Construction of terms of judgment — No refusal to pay — Whether delay in payment of installment invoked default clause — Demand for payment of interest on installments already paid, whether unconscionable*

By an agreement in writing, the defendant agreed to pay the plaintiff commission at stipulated rates for projects or contracts secured by the plaintiff, an engineer, for the defendant's consulting engineers. Having secured various projects for the defendant, the plaintiff sued the defendant for commission not paid on the projects. The parties recorded consent judgment for the plaintiff to be paid in four installments. There were no complaints with regard to the first three installment payments. However, as the cheque for the fourth installment was received three days overdue, the plaintiff contended that the default clause in the order became operable. The defendant then applied by way of summons for an order to be made to record satisfaction of the order of the court, or alternatively, that relief be granted to the defendant against any payment of interest or costs.

Held, dismissing the plaintiff's appeal and allowing the defendant's appeal:

(1) To a question from the court as to whether there was any refusal to pay the final installment, counsel contended that there was a delay. The default clause will come into effect only if the defendant refused or was unable to pay the installment. Here, there was no question of the defendant refusing, or being unable to pay. There was a mere delay of one day (see p 27D–E).

(2) The plaintiff had asked for a sum of RM5,982.15 being interest at 8% on the entire sum of RM275,000 calculated from 11–18 March 1996. Not only was this improper, it was illegal to ask for interest on installments already paid and received. The conduct of the plaintiff in demanding this interest was most unconscionable (see p 27G–H).

(3) The court was satisfied that the order of the court had not been breached in that there was no refusal to pay. There was a delay. There is no provision for the default clause to supervene (see p 28A).

[Bahasa Malaysia summary

Melalui satu perjanjian bertulis, defendan bersetuju untuk membayar plaintif komisyen pada kadar yang ditetapkan untuk projek-projek atau kontrak-kontrak yang dikenakan oleh plaintif, seorang jurutera, untuk penasihat jurutera-jurutera defendan. Setelah mendapat pelbagai projek untuk defendan, plaintif telah menyaman defendan untuk komisyen yang tidak dibayar untuk projek-projek tersebut. Kedua-dua pihak telah merekodkan penghakiman persetujuan agar plaintif dibayar empat kali ansuran. Tiada aduan berhubung tiga bayaran ansuran pertama. Bagaimanapun, memandangkan cek untuk bayaran ansuran keempat diterima lewat tiga hari, plaintif telah menegaskan bahawa klausa keingkaran di dalam perintah tersebut boleh diterimapakai. Defendan kemudiannya telah memohon melalui saman untuk satu perintah dibuat untuk merekodkan penyelesaian perintah mahkamah, atau secara alternatif, agar relif diberikan kepada defendan terhadap apa-apa bayaran faedah atau kos.

Diputuskan, menolak rayuan plaintif dan membenarkan rayuan defendan:

(1) Berhubung satu persoalan daripada mahkamah tentang sama ada terdapat apa-apa keengganan untuk membayar bayaran ansuran terakhir, peguam menegaskan bahawa terdapat kelewatan. Klausa keingkaran akan berkuatkuasa hanya jika defendan enggan atau tidak mampu untuk membayar ansuran. Di sini, tiada persoalan di mana defendan enggan, atau tidak mampu untuk membayar. Cuma terdapat kelewatan satu hari (lihat ms 27D–E).

(2) Plaintif telah meminta untuk jumlah RM5,982.15 dengan faedah pada kadar 8% ke atas keseluruhan jumlah RM275,000 dikira dari 11–18 Mac 1996. Ia bukan sahaja tidak betul, ia adalah tidak sah untuk meminta faedah ke atas ansuran yang telah dibayar dan diterima. Tindakan plaintif yang menuntut faedah ini amat tidak berpatutan (lihat ms 27G–H).

(3) Mahkamah berpuas hati bahawa perintah mahkamah tidak dilanggari kerana tidak terdapat keengganan untuk membayar. Hanya wujud kelewatan. Tiada peruntukan untuk klausa keingkaran dipakai dalam keadaan ini (lihat ms 28A).]

Notes

For cases on consent judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2497–2502.

Cases referred to

Tong Lee Hwa & Anor v Chin Ah Kwi [1971] 2 MLJ 75 (refd)

Legislation referred to

Rules of the High Court 1980 O 46

Jayne Koe (*Cheah Teh & Su*) for the plaintiff.
Kemkumar Lopez (*Kamarudin & Partners*) for the defendant.

Kamalanathan Ratnam J. :Facts

The plaintiff was at all material times an engineer and the defendant, consulting engineers. By an agreement in writing between them, the defendant agreed to pay the plaintiff commission at stipulated rates for projects or contracts secured by the plaintiff for the defendant. The plaintiff had indeed secured various projects for the defendant. The plaintiff sued the defendant for commission not paid on the various projects. On 11 December 1995, when the said suit was fixed for hearing, parties recorded consent judgment for the plaintiff in the sum of RM275,000. It was also a term of the said order that:

1 RM75,000 was to be paid on or before 15 December 1995;

2 RM70,000 was to be paid on or before 15 January 1996;

3 RM70,000 was to be paid on or before 15 February 1996; and

4 RM60,000 was to be paid on or before 15 March 1996.

The order further continued as follows:

> DAN SELANJUTNYA DIPERINTAHKAN bahawa jika defendan ingkar membayar mana-mana satu instalmen di atas, kesemua jumlah yang dikehendaki dibayar oleh defendan kepada plaintif akan menjadi tertunggak dan kena bayar dengan serta-merta dan faedah dikehendaki dibayar oleh defendan kepada plaintif pada kadar 8% setahun dari 11 Disember 1995 sehingga tarikh penyelesaian atas sebarang pembayaran yang dikehendaki dibayar oleh defendan kepada plaintif dan kos tindakan ini dikehendaki dibayar oleh defendan kepada plaintif DAN SELANJUTNYA DIPERINTAHKAN bahawa setelah defendan mematuhi kesemua obligasi mereka dalam penghakiman ini suatu perjanjian akan dibuat di antara plaintif dan defendan untuk menyatakan plaintif tiada adanya lagi apa jua tuntutan terhadap defendan mengenai perjanjian mereka bertarikh 25 Mac 1981.

There were no complaints with regard to the first three installment payments. A cheque for the fourth installment of RM60,000 was as usual sent by the defendant's solicitors by way of their letter dated 15 March 1996 and received by the plaintiff's solicitors only on 18 March 1996. The plaintiff contended that the default clause in the order became operable. This caused the defendant to apply by way of a summons (encl 53) for the following orders:

(a) that an order be made to record satisfaction of the order of court dated 11 December 1995; or alternatively

(b) that relief be granted to the defendant against any payment of interest or costs on the basis that the fourth installment had indeed been made, albeit one day later; and

(c) costs.

Findings of the court

The learned senior assistant registrar ('SAR') having heard the application, made an order in terms of prayers (a) and (c) and also stated that pursuant to O 46 of the Rules of the High Court 1980, the consent judgment dated 11 December 1995 had been paid in full in favour of the defendant. The learned SAR dismissed prayer (b) with costs. Both the plaintiff and defendant then filed separate notices of appeal. The plaintiff appealed against the order granting order in terms of prayers (a) and (c) and the defendant appealed against the order made in respect of prayer (b). I was urged by both parties to hear both appeals together.

In the course of her submission, Ms Jane Koe conceded that 16 March 1996 was indeed a Saturday and 17th a Sunday. There is no doubt that the plaintiff indeed received payment on the 18th. However, counsel argued that since the final installment was not paid by the date stipulated, the default clause had come into effect. To a question from the court as to whether there was any refusal to pay the final installment, counsel contended that there was a delay. To my mind, the default clause will come into effect only if the defendant refused or was unable to pay the installment. Here, there was no question of the defendant refusing, or being unable to pay. There was a mere delay of one day. In any case, what is the effect of the default order? It states that if any one installment remains unpaid, the entire balance becomes due and payable forthwith (serta merta) and interest at 8% becomes due and payable from 11 December 1995 to date of payment. In this case, the default clause in fact becomes stultified by the fact that the installment was the fourth and last installment, and that it was merely delayed. How would the issue of the entire balance becoming due and payable benefit the plaintiff? Whilst I agree that there was no explanation given by the defendant why the cheque could not have been dispatched on the 15th itself, I think the conduct of the plaintiff in this case leaves much to be desired. If he had wanted the interest from 11–18 March on the final installment, then there is no evidence that he had in fact asked for it. However, the plaintiff had asked for a sum of RM5,982.15 being interest at 8% on the entire sum of RM275,000 calculated from 11–18 March 1996. To my mind, not only is this improper, it is illegal to ask for interest on installments already paid and received. The conduct of the plaintiff in demanding this interest is most unconscionable. The plaintiff relied on *Tong Lee Hwa & Anor v Chin Ah Kwi* [1971] 2 MLJ 75 (FC). I cannot see the relevance of *Tong* to the case before me. In *Tong*, the court held that, 'After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement.' That is not the case here. The defendant is not applying to set aside the judgment.

Having heard full arguments, I was satisfied that the order of the court dated 11 December 1995 had not been breached in that there was no refusal to pay. There was a delay. There is no provision for the default clause to supervene. I therefore dismissed the plaintiff's appeal and allowed the defendant's appeal. I also set aside the order of the learned SAR in respect of prayer (b). The proper order in respect of prayer (b) is not to make any order. I had ordered each party to bear its own costs. On reflection, and since my order has yet to be perfected, I think the proper order is for the plaintiff to pay the costs of both the appeals.

Plaintiff's appeal dismissed, defendant's appeal allowed.

Reported by Wong Ee Lynn